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No. 87-1181

In The

Supreme Court of the United States

October Term, 1987

LARRY DEAN GAYTON,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

NEAL B. CHILDERS
Assistant Attorney General
Counsel of Record
For Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

DARYL A. ROBINSON
Senior Assistant
Attorney General

Please serve:

NEAL B. CHILDERS
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether the prosecution of Petitioner for the offense of driving under the influence (an offense of which, by his own admission, Petitioner is guilty) is nevertheless violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as a selective prosecution where a small number of traffic offenders who were wealthy citizens, politically prominent persons, sports figures, or persons conferring privileges or personal goods in exchange for favors from other law enforcement officers have not been charged with traffic offenses, when there has been no evidence or suggestion that the officer arresting Petitioner, or the Solicitor making the determination to prosecute Petitioner, had ever participated in such behavior?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

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OPINIONS BELOW

The various opinions and orders in this case are reproduced in the Appendix to the Petition for Writ of Certiorari. The opinion of the Georgia Court of Appeals of September 17, 1987, is now published at 184 Ga. App. 387 (1987).

STATEMENT OF JURISDICTION

Petitioner requests that this Court exercise the jurisdiction granted pursuant to 28 U.S.C. § 1257(3) in this matter.

STATEMENT OF THE CASE

Petitioner was charged, by accusation, with committing the traffic offenses of driving under the influence [O.C.G.A. § 40-6-391] and driving too fast for conditions [O.C.G.A. § 40-6-181(a)]. These violations were alleged to have occurred on September 12, 1986. On November 18, 1986, Petitioner appeared in the State Court of Spalding County, Georgia, and entered a plea of guilty to the charge of driving under the influence, which was accepted by the trial court. The Solicitor at that time entered a nolle prosequi on the charge of driving too fast for conditions. A Motion for a New

Trial, in Arrest of Judgment, and Notwithstanding the Verdict was filed the next day, November 19, 1986, and was subsequently denied. Petitioner subsequently filed a Notice of Appeal to the Georgia Court of Appeals, which rendered its opinion affirming the judgment below. The Georgia Supreme Court denied Petitioner's Petition for Writ of Certiorari.

The gist of Petitioner's Appeal (and of the Petition for Writ of Certiorari) is his claim that, because members of the Georgia State Patrol other than the arresting officer on occasion "fixed" tickets for politicians, and other persons of influence, or declined to make charges against them in the first instance, his admittedly criminal conduct should be excused and he should be granted immunity to violate the laws of the State of Georgia. Respondent's position, stated simply, is that Petitioner may not be granted such immunity. The evidence of record discloses not even the slightest suggestion that the officer who arrested Petitioner had ever participated in the "fixing" of tickets, nor is there any evidence of record that the prosecutor of the State Court of Spalding County had ever participated in such behavior, either. In ruling on Petitioner's claim, the Georgia Court of Appeals held that:

> The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective prosecution by those who are not.

Gayton v. State, 184 Ga. App. 387, 388 (1987).

REASONS FOR DENIAL OF THE WRIT

A. PETITIONER'S PLEA OF GUILTY TO THE CHARGES CONSTITUTED A WAIVER OF ANY AND ALL DEFENSES TO THE CHARGE WHICH PETITIONER MAY HAVE POSSESSED.

As noted *supra*, Petitioner appeared before the State Court of Spalding County to answer the charges brought against him. With the advice and assistance of counsel, Petitioner entered a plea of guilty to the offense of driving under the influence. As a matter of federal law, once a criminal defendant has admitted in open Court that he is in fact guilty of the offense with which he is charged, he may no longer raise independent claims relating to the deprivation of constitutional rights prior to the entry of the plea, but:

> [M]ay only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not ["within the range of competence demanded of attorneys in criminal cases."]

Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) [material in brackets quoted from *McMann v. Richardson*, 397 U.S. 759, 771 (1970)].

In the case at bar, of course, Petitioner has entered a plea of guilty to the charge of driving under the influence in the Georgia trial court. Neither his Appeal to the Georgia Court of Appeals, nor the Petition for Writ of Certiorari, challenges the voluntary and intelligent character of that plea, or even suggests that the advice given him by counsel was not at least minimally competent. In any event, such a claim may not first be

raised before the United States Supreme Court. *Tollett, supra,* at 269. Accordingly, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied, as Petitioner's voluntary and intelligent plea of guilty to the charge of driving under the influence waived any right which he might have had to raise a defense of selective prosecution.

B. PETITIONER'S ARREST AND PROSECUTION WERE ENTIRELY CORRECT AND PROPER, AND PETITIONER HAS NOT SHOWN ANY IMPROPER MOTIVATION OF THE ARRESTING OFFICER OR SOLICITOR WHICH WOULD WARRANT THE REVERSAL OF HIS CONVICTION.

The gist of Petitioner's contention is simple: that, because some members of the Georgia State Patrol, on occasion, declined to prosecute certain individuals for violations of Georgia's traffic laws, Petitioner should be given judicial license to drive on Georgia's highways while intoxicated. Petitioner contends, based upon an investigation of the Georgia Department of Public Safety conducted by agents of the Georgia Bureau of Investigation, that various influential persons have been given, in effect, immunity from prosecution for violations of the traffic laws, and asserts that he is entitled to that immunity as well. The State of Georgia submits that this Court should decline to adopt his position, and should also deny the Petition for Writ of Certiorari.

The principle that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits selective prosecution was clearly

established by the United States Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886), wherein this Court addressed a law that required that persons using wooden buildings as laundries obtain the assent of the Board of Supervisors. Although the law was facially neutral, the evidence adduced showed that the Board of Supervisors withheld its consent from persons of Chinese ancestry, while granting assent to applicants who were non-Chinese. This Court held that such discrimination on the basis of race and nationality was prohibited by the United States Constitution. *Id.*, at 374.

This Court more recently had occasion to discuss these issues in *Wayte v. United States,* 470 U.S. 598 (1985), wherein a selective prosecution challenge was raised to the United States' passive prosecution policy with respect to individuals who refused to register with the selective service. In *Wayte,* this Court clearly ruled that the burden is on the defendant to show that the state's system of enforcement had a discriminatory effect and that that system was motivated by a discriminatory purpose. *Wayte, supra,* at 608. Decisions of the Federal Circuit Courts of Appeals have set out similar tests. *See, e.g., United States v. Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974) (defendant must show that he has been singled out for prosecution, while others similarly situated have not been proceeded against and that the selection of the defendant for prosecution was based upon impermissible considerations); *United States v. Hayes,* 589 F.2d 811, 819 (5th Cir. 1979) (defendant must show that others similarly situated have not been prosecuted and that his prosecution is based upon impermissible considerations); *United States v. Wyman,*

724 F.2d 684, 687 (8th Cir. 1984) (same); *United States v. Wilson,* 639 F.2d 500, 504 (9th Cir. 1981) (same).

The common thread running through all of the cases which deal with a defense of selective prosecution is an allegation (whether or not successful) that the defendant has been singled out and prosecuted for an offense that virtually all other citizens are permitted to commit with impunity. In the instant case, by contrast, Petitioner is, by his own admission, a member of the vast majority (specifically, "an ordinary and common citizen of the State of Georgia."). Brief of Petitioner before the Georgia Court of Appeals, at 4. Petitioner's Complaint is not that he is a member of a minority singled out for prosecution, but, rather, that he has been denied entrance to the privileged minority who has not been prosecuted. Indeed, a review of Petitioner's Brief filed before the Georgia Court of Appeals reveals his "demand" to be granted immunity from prosecution for traffic offenses "as if he too were an employee of Callaway Gardens, an employee of GSP, and an influential citizen, all rolled into one." *Id.*, at 11. The rights granted by our Constitution were never meant to be applied in so perverted a fashion.

It is submitted by Respondent that Petitioner has utterly failed to meet the test set forth by this Court in *Wayte,* in that he has shown no discriminatory effect or purpose on the part of either the Trooper who arrested him or the Solicitor who prosecuted him. Indeed, the record in this case contains not a shred of evidence (or even the slightest suggestion) that the arresting officer or prosecutor in this case has *ever* "fixed" a ticket in his professional career. Whether or not other law enforcement officials have "fixed" tickets for other drivers is

simply irrelevant to the case at bar. As the Georgia Court of Appeals correctly held:

> The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective prosecution by those who are not. . . .There is no evidence in this record that Gayton was treated any differently than the vast majority of other DUI offenders in this state. Certainly there is no evidence that Gayton was selected for punishment because of his race, religion, or exercise of constitutional rights.

Gayton, supra, at 388.

CONCLUSION

It is undisputed in this case that Petitioner committed the offense charged. While the State of Georgia does not condone the "fixing" of tickets, there is not a shred of evidence that the arresting officer who arrested Petitioner, or the Solicitor who prosecuted him, was motivated in any manner whatsoever by any improper purpose. Petitioner has the burden of proof in this matter; he has failed to meet that burden. As a matter of law, his prosecution did not violate any provision of the United States Constitution. Contrary to Petitioner's contentions, he has not been selectively prosecuted; indeed, his real complaint is the state's refusal to afford him special favors. Accordingly, for the above and foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

DARYL A. ROBINSON 610012
Senior Assistant Attorney General

NEAL B. CHILDERS 124410
Assistant Attorney General

Please serve:

NEAL B. CHILDERS
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3358